No. 15649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

On July 12, 1949, Appellant was a member of the Brotherhood of Railroad Trainmen and was employed as a brakeman by the Appellee on its South Central District, operating out of Las Vegas, Nevada. Appellant reported for duty on said date at 9:15 P.M. and was instructed to deadhead to Nipton, California, for swing service to protect Train No. X 1622 E [R. 17, 18, 20]. Appellant returned to Las Vegas, Nevada, on Train No. X 1623 E at 12:35 A.M., July 13, 1949, contrary to express instructions to remain at Nipton, California, to protect X 1622 E, estimated to arrive there at approximately 4:00 A.M., July 13, 1949 [R. 18, 26, 27, 28]. On July 16, 1949, Appellant was charged with violating Operating Rules 700 and 702, and was given written notice on said date to appear for investigation and hearing on said charges the following day at 10:00 A.M., July 17, 1949 [R. 13]. Appellant appeared and acknowledged receipt of written

notice within the time provided in his schedule [R. 13]. However, he requested a postponement upon the ground that his representative, the local chairman of his brotherhood, was not present [R. 14, 15]. Appellant's representative, local chairman E. C. Grounds [R. 16], was in the City of Las Vegas, Nevada, at 7:50 P.M., July 16, 1949, was rested by 10:00 A.M., July 17, 1949, and did not depart from Las Vegas until 8:00 P.M. of July 17, 1949 [R. 23]. No explanation was given as to why Appellant's representative was not present at the investigation and hearing at 10:00 A.M., July 17, 1949. Nevertheless, the requested postponement of investigation and hearing was granted until July 18, 1949, at 9:30 A.M. [R. 14], and consented to by Appellant in writing [R. 15].

On July 18, 1949, Appellant requested a further postponement, claiming that his representative, Mr. E. C. Grounds, was in Milford, Utah, and he did not wish to have the investigation until after the return of Mr. Grounds. He was told that the investigation and hearing would be deferred until 2:30 P.M., and advised to get another representative [R. 16]. At 2:30 P.M., July 18, 1949, Appellant did not appear and the investigation hearing was held in his absence, with questions propounded to various employees by W. B. Groome, Assistant Superintendent, and the proceedings reported by S. M. Smith, Chief Clerk to the Assistant Superintendent [R. 17-29]. On July 24, 1949, Appellant was discharged from the service of Appellee [R. 7].

Three days later, by letter dated July 27, 1949, directed to Death Valley Lodge No. 781, of the Brotherhood of Railroad Trainmen, Appellant requested action for his reinstatement with pay for all time lost and all seniority and all rights restored [R. 51]. Negotiations between the

Appellant's representative and the Appellee resulted in an offer by Appellee to return Appellant to service on a leniency basis [R. 29-33]. This offer was rejected by Appellant and Appellee was notified that the case would be submitted to the National Railroad Adjustment Board [R. 34-37]. On January 11, 1951, Appellant's claim for restoration to service with all rights unimpaired and for pay for all time lost since July 13, 1949, was submitted by the Brotherhood of Railroad Trainmen in behalf of Appellant, to the National Railroad Adjustment Board, pursuant to the provisions of the Railway Labor Act (Title 45 U. S. C. A., Sec. 151 *et seq.*) [R. 5-56]. Oral hearing was waived by Appellant in his submission [R. 12], and agreed to by Appellee [R. 57].

On June 25, 1952, the National Railroad Adjustment Board issued Award No. 15509 in Docket No. 27393, denying Appellant's claim in its entirety [R. 56-59]. On June 6, 1955, Appellant filed a Complaint in the District Court alleging that his dismissal was in violation of the collective bargaining agreements between the Brotherhood of Railroad Trainmen and the Appellee, and demanding judgment in the amount of $118,517.00 [R. 3-5]. Prior to Answer, Appellee filed a motion for summary judgment supported by affidavits, the Agreement between the brotherhood and Appellee, and the proceedings before the National Railroad Adjustment Board. Appellant argued that he had not authorized submission of his case to the Board, denied that the brotherhood had authority to represent him, and denied notice or knowledge that his claim had been presented to the Board until after it had made its decision. Because of the doubt thus created relative to the brotherhood's authorization, Appellee's first motion for summary judgment was denied on May 11, 1956.

Appellee then filed its Answer denying Appellant's allegations of wrongful dismissal, and alleging as a separate defense the authority contained in the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen for representation of individual claimant members before any person, board or other tribunal provided by law or otherwise. Appellee further alleged, as a part of said defense, the proceedings before the Board as a final determination of the matters alleged in the Complaint, and a bar to the maintenance of this action by the Appellant [R. 68-72].

Appellee then served Appellant with a request for admission concerning the authorization for representation contained in the brotherhood's Constitution, By-Laws, and Rules [R. 72-74], which was admitted by the failure of Appellant to answer said request. On July 20, 1956, Appellee took the deposition of D. R. Altier, General Chairman of the Brotherhood of Railroad Trainmen, concerning correspondence between said brotherhood and Appellant from 1949 through 1952, and showing continual information and advice to Appellant of proceedings in his case, both with officials of Appellee, and with respect to and determination by the National Railroad Adjustment Board [R. 74-84]. Appellee then sought and obtained leave to move for summary judgment [R. 85-86], and thereafter filed its motion for summary judgment [R. 87-89]. After argument, on May 22, 1957, Appellee's motion for summary judgment was granted [R. 94], from which this appeal has been taken by Appellant. Although Appellant at first argued in the District Court that he was not bound by the action of his brotherhood, Appellant, in his specification of errors to this court, now states that he does not rely on any claim that he did not authorize the submission of his case to said Board [R. 97].

ARGUMENT.

I.

A Discharged Employee of a Carrier Who Submits His Claim to the National Railroad Adjustment Board Upon the Merits and Receives an Adverse Award, May Not Thereafter Sue His Employer in Court for Damages for Wrongful Discharge.

Although the question presented by this appeal has never been decided by this court, it is not novel or new.

The Railway Labor Act, 45 U. S. C. A., Secs. 151-188, creates a National Mediation Board to assist in negotiations, arbitration and conciliation relative to collective bargaining agreements. It also creates a National Railroad Adjustment Board with jurisdiction to consider and determine disputes arising under collective agreements and disputes with carriers affecting individual members of a Union.

The Supreme Court of the United States has interpreted the provisions of the Railway Labor Act in a number of leading cases involving jurisdiction of the National Mediation Board and the National Railroad Adjustment Board, questioned authority of a Union to represent its members in negotiations for collective bargaining agreements, interpretations of said agreements, finality of awards in individual grievances, and questioned authority of a Union to represent its individual members in individual grievances before the National Railroad Adjustment Board.

Prior to its decision in *Moore v. Illinois Central Railroad Company* (1940), 312 U. S. 630, 85 L. Ed. 1089, both the railroad brotherhoods and the National Railroad Adjustment Board assumed that the Board had exclusive jurisdiction to consider all disputes, not only as to nego-

tiations for collective bargaining agreements and interpretation of said agreements, but also as to individual grievances arising under such agreements. In the *Moore* case a member of the Brotherhood of Railroad Trainmen filed an action for damages for wrongful discharge based upon a collective agreement between the Brotherhood of Railroad Trainmen and the defendant railroad. The defendant contended, among other things, that such action was premature because the plaintiff had failed to exhaust the administrative remedy given to an employee under the Railway Labor Act to submit his claim to the National Railroad Adjustment Board. The United States Supreme Court concluded that the remedy for an individual claim or grievance provided under the Railway Labor Act was not exclusive and "that the petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to a suit for wrongful discharge."

In the same year, 1941, the Supreme Court granted certiorari in the case of *Washington Terminal Co. v. Boswell,* 124 F. 2d 235. Affirmed 1942, 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694. This case involved a dispute between the carrier and two Unions. The defendant Unions claimed that they were entitled under their agreement to do certain work which others had previously done. The carrier rejected this claim, whereupon the employees made a submission of the dispute to the National Railroad Adjustment Board, which made an award in favor of the employees. Instead of complying with the award, the carrier plaintiff commenced this action for a declaratory judgment, which was dismissed by the District Court, affirmed by the United States Court of Appeals for the District of Columbia, and affirmed by the United

States Supreme Court, by a divided court. The suit sought an adjudication of rights under the contract, and a declaration that the Board's award and order were void. No opinion was filed by the Supreme Court.

However, Justice Rutledge, speaking for the majority of the United States Court of Appeals, concluded that the Board's decisions are enforceable, not merely advisory or private, and are binding on both parties. In his opinion he construed the effect of Section 153 of the Act as follows:

> "Section 3 establishes the Adjustment Board and gives its first division '*jurisdiction* over disputes involving train-and-yard-service employees.' 45 U. S. C. A., Sec. 153, First (h). The dispute is referred to the Board, after unsuccessful private negotiation, 'by *petition* of the parties or *by either* party' id. (i). Awards must be stated in writing and 'shall be *final and binding* upon both parties' except as to money awards' id. (m). When the award favors the petitioner-employee, the Board must make 'an *order,* directed to the carrier, to make the award effective.' Id. (o). 'Jurisdiction,' 'petition * * * by either party,' 'final and binding upon both parties,' 'an order, directed to the carrier,' these are not words of polite suggestion. They are terms of duty, if not of force. They describe power and decision, not mere advisory intermediation. That is true though the Board has no power to enforce its orders otherwise than by decision. In that respect the awards and orders may be said to constitute a kind of administrative declaratory judgment. * * *
>
> "But it is said the decision in *Moore v. Illinois Central R. Co.,* supra, and language of the opinion, establish that Congress intended the Board to be a private agency and its awards to have private, ad-

> visory character. * * * The *Moore* case holds that Congress has not compelled disputants to go before the Board. It does not hold that, having gone, they can disregard the award and its consequences at will."

Following its decision in the *Washington Terminal Co.* case, the Supreme Court next had before it the case of *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 89 L. Ed. 1886. Its first opinion in this action was filed June 11, 1945. The facts in this case, although somewhat complicated, may be summarized as follows: A dispute had arisen between engineers, firemen, and yardmen, all employees of the carrier, concerning terms of their employment. In 1934 a settlement agreement was apparently reached on all matters except the issue of "starting time." The Brotherhood of Railroad Trainmen claimed that Article 6 of a 1927 agreement between said brotherhood and the carrier became applicable to certain employees with the settlement of 1934. This Article related to "starting time." The carrier disagreed, and frequent negotiations were had on the property. In 1936, plaintiffs authorized their brotherhood to file a complaint with the National Railroad Adjustment Board. This submission to the Board was intended to secure compliance with Article 6 of the agreement, and there was no claim for money damages. A settlement was reached between the brotherhood and the carrier by letter agreement dated October 31, 1938, which also provided for a release of all claims then pending, with a further provision that no other claims of a like or similar nature accruing prior to the settlement date would be presented. The carrier and the brotherhood then jointly requested that the pending claim be withdrawn from the Docket of the Board, which

was done. Thereafter a further dispute arose concerning the applicability of Article 6 of the agreement during the period between 1934 and the settlement of 1938. The brotherhood, in May, 1939, made a submission to the Board of claims for penalty damages accruing between 1934 and 1938, contending that the settlement agreement of October 31, 1938, was effective only to fix "starting time" for the future, and had no effect to waive or determine individual claims for penalty damages prior to said agreement. The carrier contended that the settlement precluded the submission of any claim, either individual or collective, occurring prior to the settlement date. A referee was called in to sit with the Board because of a deadlock, whereupon the Board agreed with the carrier and denied the claim submitted May 18, 1939, by the brotherhood.

Plaintiffs then commenced this action for penalty damages for alleged violation of the agreement. The carrier moved for summary judgment, claiming that the award of the Board in the brotherhood's submission of May, 1939, was final and binding on the plaintiffs. The plaintiffs claimed that the brotherhood had no authority to release their individual claims in the settlement of 1938; that the brotherhood's constitution and rules contained an express prohibition against such action by brotherhood officials without specific authority from the individual members, and that the carrier had knowledge of such prohibition. Plaintiffs also questioned the validity and conclusive effect of the Board's award, and contended that its decisions are void because it acts "merely as an arbitrator." In addition to its claim of "finality," the carrier also contended that the brotherhood had authority to make the

submission in question to the Board by virtue of the statutory provisions of the Railway Labor Act, without specific authority.

The District Court agreed with the carrier, and granted summary judgment to the defendant. The United States Court of Appeals for the Seventh Circuit concluded that the record presented a question of fact concerning the authority of the brotherhood as to whether or not the brotherhood had been authorized to compromise, release, or settle the individual claims of the plaintiffs. The summary judgment was reversed by the appellate court, whereupon the Supreme Court granted Certiorari, and thereafter affirmed the judgment of the Court of Appeals upon the ground that the record did present an issue of fact concerning the authority of the Brotherhood to represent the plaintiffs.

Although the decision in this case was based primarily upon the issue of authorized representation, which is not an issue in the instant case, nor even before this court for consideration, there was also an issue on the "finality" provision of the Act (Sec. 153 First (m), 45 U. S. C. A.) which was squarely before the court and necessarily decided by the court. It is interesting to note that the positions of the carrier and the brotherhood in the *Elgin* case are just the reverse of the parties in the prior *Washington Terminal Co.* case. In the *Elgin* case the brotherhood, instead of the carrier, was contending that Board decisions are merely advisory and would not, therefore, preclude an action for a declaratory judgment. The Supreme Court, in the words of the late Justice Rutledge (who also wrote the majority opinion of the United States Court of

Appeals in the *Washington Terminal Co.* case), construed the "finality" provision of the Act as follows:

> "Respondents attack the validity and legal effectiveness of the award in three ways. Two strike at its validity on narrow grounds. Respondents say the Brotherhood had no power to submit the dispute for decision by the Board without authority given by each of them individually and that no such authority was given. They also maintain that they were entitled to have notice individually of the proceedings before the Board and none was given.
>
> "The third and most sweeping contention undercuts all other issues concerning the award's effect, whether for validity or finality. In substance it is that the award, when rendered, amounts to nothing more than an advisory opinion. The contention, founded upon language of the opinion in *Moore v. Illinois C. R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, regards the Act's entire scheme for the settlement of grievances as wholly conciliatory in character, involving no element of legal effectiveness, with the consequences that the parties are entirely free to accept or ignore the Board's decisions.
>
> "At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history. The *Moore* case involved no question concerning the validity of the legal effectiveness of an award when rendered. Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise."

The Supreme Court then discussed the difference between "major disputes," which go to the National Mediation Board under the Act, and grievances, which go to the National Railroad Adjustment Board for decision.

As to "Major disputes," the court pointed out that the processes under the Act are clearly voluntary, involving negotiation, meditation, arbitration, and conciliation, with no authority empowered to decide the dispute, unless the parties themselves agree to arbitration. The Court then construed the procedure for the settlement of grievances as follows:

> "The course prescribed for the settlement of grievances is very different beyond the initial stage. Thereafter the Act does not leave the parties wholly free, at their own will, to agree or not to agree. On the contrary, one of the main purposes of the 1934 amendments was to provide a more effective process of settlement. * * *
>
> "The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them."

Thereafter, the Supreme Court granted a motion for reargument of the *Elgin* case and filed its opinion on March 25, 1946, 327 U. S. 661, 90 L. Ed. 928. The Court amplified its former opinion concerning the finality of a grievance award by the Board, in these words:

> "Moreover, when an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong. Its action in adjusting an individual grievance at the instance of the collective bargaining agent is entitled to presumptive weight. * * * We did not rule, and there is no basis for assuming we did, that an em-

ployee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights."

Order of Railway Conductors v. Pitney (decided Jan. 14, 1946), 326 U. S. 561, 90 L. Ed. 318, was a case involving a dispute between two brotherhoods concerning certain work under agreements with the Central Railroad Company of New Jersey. The railroad was in reorganization proceedings under the Bankruptcy Act. The trustee agreed with the trainmen, whereupon the conductors brought this suit in the reorganization court. The District Court agreed with the trainmen and dismissed the petition on the merits. The Circuit Court of Appeals held that the petition should have been dismissed on jurisdictional grounds because the remedies under the Railway Labor Act for the settlement of disputes such as here involved are exclusive.

Having granted Certiorari, the Supreme Court held that the District Court had supervisory powers to instruct its trustees, but that an injunction should not issue, if at all, until after submission of the dispute to the National Railroad Adjustment Board for its interpretation of the agreements.

"The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under Section 3 First (o) and (p) grant a money award subject to judicial review with an allowance for attorney's fees should the award be sustained. Not only has Congress thus designated an

> agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts."

The next important Railway Labor Act case before the United States Supreme Court was *Slocum v. Delaware, L. & W. R. Co.* (decided April 10, 1950), 339 U. S. 239, 94 L. Ed. 796. In this case the respondent railroad had separate collective bargaining agreements with two unions. A dispute arose between the two unions concerning the scope of their respective agreements. Negotiations were had between the railroad and the unions without agreement. Instead of invoking the jurisdiction of the Adjustment Board, the railroad filed this action in a New York State court for a declaratory judgment interpreting the contracts and was granted such a judgment on the ground that the decision in *Moore v. Illinois Central R. Co.,* 312 U. S. 630, 85 L. Ed. 1089, left state courts free to adjudicate disputes arising out of a collective agreement without obtaining the Board's interpretation of that agreement. The Supreme Court reversed and remanded in these words:

> "Our holding here is not inconsistent with our holding in *Moore v. Illinois Cent. R. Co.* * * * Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. * * *

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the *Moore* Case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion."

On the same day that the court decided the *Slocum* case, April 10, 1950, the Supreme Court also filed its opinion in *Order of R. C. of A. v. Southern R. Co.,* 339 U. S. 255, 94 L. Ed. 811. In this case a dispute arose between certain conductors and the railroad concerning the railroad's obligations under an agreement. Negotiations were commenced for a construction of the agreement. The railroad then filed an action in the state court for a declaratory judgment interpreting the agreement. The state trial court concluded that it lacked jurisdiction, citing *Order of R. Conductors v. Pitney,* 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322. The state Supreme Court reversed, holding that the state court did have power to interpret the agreement. The state trial court then entered a declaratory judgment as requested by the railroad, which was affirmed by the state Supreme Court.

The Supreme Court of the United States granted Certiorari, and thereafter reversed, stating:

> "For reasons set forth in the *Slocum* case, 339 U. S. 239, ante, 795, 70 S. Ct. 577, we hold that the South Carolina state court was without power to interpret the terms of this agreement and adjudicate the dispute."

Following its decision in the *Slocum* case and the *Order of R. C. of A. v. Southern R. Co.* case, the Supreme Court denied a petition for a Writ of Certiorari on October 22,

1951, in the case of *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224, cert. den. 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648. In this case plaintiff, who was a discharged railroad employee, filed a Complaint for wrongful discharge. The defendant moved for summary judgment, based upon a showing that plaintiff, through his union representative, had prosecuted his claim for reinstatement and for time lost before the National Railroad Adjustment Board, which had sustained the dismissal. Summary judgment was granted, and affirmed on appeal, by the United States Court of Appeals for the Fifth Circuit.

Because of the importance of the denial of certiorari in this case, the following quotations from the opinion of the Court of Appeals are indeed significant:

> "The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages. We are of the opinion that under these circumstances, the proceeding before the National Railroad Adjustment Board evidenced an election of inconsistent remedies in that it was an acceptance of one of the two means afforded by law for redress for any grievances or claim arising out of the alleged unjustified discharge of the then claimant, now appellant, Michel.
>
> "There would seem to be no occasion here for any detailed discussion of the purpose and effect of the Railway Labor Act, 45 U. S. C. A. Section 151, et

seq. This subject has received exhaustive consideration in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; Id., 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928; Washington Terminal Co. v. Boswell, 75 U. S. App. D. C. 1, 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694, and others which could be mentioned. Suffice it here to say that Congress provided procedure whereby the carriers and their employees might obtain a speedy and just determination of grievances by a body recognized as qualified by experience to settle such disputes by a hearing, which even if informal from the judicial standpoint, nevertheless affords opportunity for presentation and determination of claims by the application of rules and principles developed by experience and well understood by carriers, their employees, and union representatives. Further reference to Slocum v. Delaware, L. & W. R. Co., supra, Order of Ry. Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318, and the Burley case, supra, manifest the important and significant role of the National Railroad Adjustment Board in effectuating the congressional intent to provide means for the effective settlement of disputes between carriers and their employees. There is, however, no requirement that an employee so prosecute his claim for relief for breach of an employment agreement before the Adjustment Board. He may proceed in the first instance by suit in the Courts to recover damages for breach of the contract. Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, and as further discussed in Slocum v. Delaware, L. & W. R. Co., supra. However, when there is a voluntary election to proceed

in the manner provided by the Railway Labor Act, 45 U. S. C. A. Sec. 151 et seq., supra, and the claim pursued to a determination of the merits by the Adjustment Board, this procedure by both right and reason represents an election of remedies which bars the independent suit which was otherwise available to the claimant.

"* * * In any event, it can not be questioned that by the Act Congress has established a forum for the settlement of such disputes to which the employee may resort if he so desires. Consequently, there would appear no reason for not enforcing in such instances the fundamental principle that where one of two inconsistent remedies are available, the election of one precludes recourse to the other. This has been the uniform holdings, correctly we think of the Courts which have considered this question. It follows, therefore, that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

Since the Supreme Court denied Certiorari in this case, its action must necessarily be construed as an affirmance of the opinion of the Fifth Circuit Court of Appeals, and approval of the summary judgment granted by the District Court.

Finally, the United States Supreme Court construed the provisions of the Railway Labor Act in an opinion filed June 1, 1953, in the case of *Transcontinental & West.*

Air v. Koppal, 345 U. S. 653, 97 L. Ed. 1326. In this case plaintiff was an employee of an air carrier subject to Title II of the Railway Labor Act. He was discharged after a hearing but did not appeal this discharge to company officials, as required by the terms of his employment contract. Koppal filed suit in a District Court and recovered a jury verdict, which was set aside by the Court, and judgment entered for the defendant carrier upon the ground that Koppal had not exhausted the administrative remedy in his contract by appeal provided in the contract, as required by Missouri law. The United States Court of Appeals for the Eighth Circuit, reversed the judgment (199 F. 2d 117), whereupon the United States Supreme Court granted Certiorari, "Because of differing opinions expressed as to the effect of our decisions in Moore v. Illinois Cent. R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, and Slocum v. Delaware L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577, and due to the importance of the case in relation to the Railway Labor Act."

The judgment of the Court of Appeals was reversed, and the judgment of the District Court for the defendant was affirmed.

After quoting from its opinions in the *Moore* and *Slocum* cases, the court then stated:

> "The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum Case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures pre-

scribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law.

"On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so."

Analysis of the foregoing decisions leads to the following conclusions:

(1) The National Railroad Adjustment Board has exclusive jurisdiction to determine disputes between unions, or between a union and the carrier, of the type involved in the *Slocum* case, requiring an interpretation of a collective agreement. An action for a declaratory judgment will not lie, and courts have no jurisdiction to consider such a dispute. (*Washington Terminal Co. v. Boswell,* 124 F. 2d 235, Affirmed 319 U. S. 732, 87 L. Ed. 1694; *Order of Railway Conductors v. Pitney,* 326 U. S. 561, 90 L. Ed. 318; *Slocum v. Delaware, L. & W. R. Co.,* 339 U. S. 239, 94 L. Ed. 796; *Order of R. C. of A. v. Southern R. Co.,* 339 U. S. 255, 94 L. Ed. 811.)

(2) In cases of individual grievances, a discharged employee has an administrative remedy, under the Act, which he may pursue before the Board. It is not necessary for him to resort to this administrative remedy before commencing a court action for wrongful discharge, if the state law permits such an action. (*Moore v. Illinois Central Railroad Company,* 312 U. S. 630, 85 L. Ed. 1089;

Transcontinental & West. Air v. Koppal, 345 U. S. 653, 97 L. Ed. 1326.)

(3) A discharged employee has an election, either to pursue his administrative remedy before the Board, or commence a court action for wrongful discharge. He may not do both. (*Michel v. Louisville & N. R. Co.,* 188 F. 2d 224, cert. den. 342 U. S. 862, 96 L. Ed. 648; *Transcontinental & West. Air v. Koppal,* 345 U. S. 653, 97 L. Ed. 1326.)

(4) Where the state law requires one to exhaust his administrative remedy provided in a contract before commencing a court action for breach of contract, a discharged carrier employee must do so, if his employment contract so provides. (*Transcontinental & West. Air v. Koppal,* 345 U. S. 653, 97 L. Ed. 1326.)

(5) A discharged employee is not bound by representation by his union before the Board, unless he has authorized such representation, either directly or indirectly, or by virtue of the Constitution and by-laws of his union, or by some other legally sufficient manner. He may not, however, stand by with knowledge or notice of what is going on between a carrier and his union, or before the Board on a submission of his claim by his union, allow his claim to be thrashed out to a conclusion, and then attempt to assert his individual rights by a court action. (*Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 89 L. Ed. 1886; re-argued 327 U. S. 661, 90 L. Ed. 928.)

(6) Awards of the National Railroad Adjustment Board are final and binding on both parties, except as to money damages. (*Washington Terminal Co. v. Boswell,* 124 F. 2d 235, Affirmed 319 U. S. 732, 87 L. Ed. 1694; *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 89 L. Ed. 1886; re-argued 327 U. S. 661, 90 L. Ed. 928.)

(7) Where the validity of an award by the Board is questioned in an appropriate proceeding before the courts, such award is nevertheless entitled to presumptive weight and one who would upset it carries the burden of showing that it was wrong. (*Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 89 L. Ed. 1886; re-argued 327 U. S. 661, 90 L. Ed. 928.)

Not only is an award entitled to presumptive weight as to its validity and regularity in the proceedings leading up to such an award, but courts will not review an award unless specific issues are presented in the pleadings or in the record attacking the validity of the award upon some basis amounting to a denial of due process of law. This will be discussed in the cases which follow.

Appellant has misconstrued the purport of the Supreme Court decisions referred to in his brief. Although Appellant asserts at page 7 of his brief that the Supreme Court has not had occasion to flatly rule with respect to the "finality" provision in a wrongful discharge case which has been determined by the Board, a reading of the foregoing decisions will disclose that the Supreme Court has repeatedly construed the jurisdiction of the Board and ruled on the "finality" provision in the Act. The Supreme Court in both the *Elgin* cases and the *Washington Terminal Co.* case expressly construed the effect of Section 153 First (m) of the Railway Labor Act *(supra).* Although the *Elgin* cases were decided upon questioned authorization of the Union to act for the plaintiffs, and the *Washington Terminal Co.* case was an action for a declaratory judgment, the Supreme Court necessarily construed Section 153 First (m) of the Railway Labor Act, and the final and binding effect thereof. The *Slocum* case, cited by Appellant, was not a wrongful discharge case but

rather was an action for a declaratory judgment seeking an interpretation of two collective agreements. These are the three cases relied upon most heavily by the Appellant (Appellant's Br. pp. 7-16), although none of them involved an alleged wrongful discharge, as in the instant case. However, rather than support the argument of the Appellant, these cases support the position of the Appellee. The conclusion that these Supreme Court decisions are contrary to the argument of Appellant is made even more apparent by the denial of Certiorari by the Supreme Court in the *Michel* case, and the opinion of the Supreme Court in the *Transcontinental & West. Air* case.

Other courts which have had occasion to decide wrongful discharge cases under fact situations identical with or similar to the record before this court have had no difficulty in applying the foregoing decisions. It has not been necessary for these courts to theorize or conjecture about the possible effect of the dissenting opinion written by Circuit Justice Stephens in the *Washington Terminal Co.* case, as Appellant did on pages 11-13 of Appellant's brief. Justice Stephens' dissenting opinion, in a case seeking a declaratory judgment, has never been followed by any court in a wrongful discharge case. The *Moore* case, 312 U. S. 630, 85 L. Ed. 1089, in effect, holds that if the state law permits a common law or a statutory action for breach of an employment contract, the employee has an election of remedies and the procedure outlined in the Railway Labor Act for settlement of grievances is not an exclusive remedy for alleged wrongful discharge. (*Washington Terminal Co. v. Boswell* (1941), 124 F. 2d 235, affirmed (1942), 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694; *Elgin, Joliet & Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 89 L. Ed. 1886; *Elgin, Joliet & Eastern R. Co. v. Burley* (1946), 327 U. S. 661, 90 L. Ed. 928;

Adams v. N. Y. C. & St. L. R. Co. (1941), 121 F. 2d 808; *T. W. A. v. Koppal* (1953), 345 U. S. 653, 97 L. Ed. 1326; *O. R. C. v. Southern R. Co.* (1950), 339 U. S. 255, 94 L. Ed. 811; *Michel v. L. & N. R. Co.* (1951), 188 F. 2d 224, cert. den. Oct. 22, 1951, 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648.)

The existence of an election of remedies for the employee does not establish a duality of remedies. The remedy provided by the Act, and a court action, are mutually exclusive. The employee may proceed either in accordance with the administrative procedure provided in his employment contract, with successive appeals up to and including the National Railroad Adjustment Board, or he may resort to his action at law for alleged unlawful discharge, if the state law permits such a claim. Once the election of remedies is made by the employee to proceed to an administrative determination under his contract before the National Railroad Adjustment Board, he may not thereafter disregard the finality of the decision and award by the Board and resort to court action. The courts have uniformly granted motions for summary judgment in behalf of a defendant carrier where an employee seeks judicial relief after having received an adverse award from the National Railroad Adjustment Board. This has been true whether the court action was simply for wrongful discharge (as in the instant case), or was an action to set aside the award of the Board, or an action seeking a judicial review of the Board's award, or a combination of all of these forms of relief. (*Michel v. L. & N. R. Co.* (1951), 188 F. 2d 224, cert. den. Oct. 22, 1951, 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648; *T. W. A. v. Koppal* (1953), 345 U. S. 653, 97 L. Ed. 1326; *Berryman v. Pullman Co.* (1942), 48 Fed. Supp. 542; *Kelly v. N. C.*

& St. L. Ry. Co. (1948), 75 Fed. Supp. 737; *Ramsey v. C. & O. R. Co.* (1948), 75 Fed. Supp. 740; *Hecox v. Pullman Co.* (1949), 85 Fed. Supp. 34; *Reynolds v. D. & R. G. W. R. Co.* (1949), 174 F. 2d 673; *Futhey v. A. T. & S. F. Ry. Co.* (1951), 96 Fed. Supp. 864; *Parker v. I. C. Ry. Co.* (1952), 108 Fed. Supp. 186; *Greenwood v. A. T. & S. F. Ry. Co.* (1954), 129 Fed. Supp. 105; *Majors v. Thompson* (5th Cir., decided June 30, 1956), 235 F. 2d 449; *Ellerd v. Southern Pacific Railroad Co.* (7th C. C. A., Mar. 1, 1957), 241 F. 2d 541.)

In *Berryman v. Pullman Co.,* 48 Fed. Supp. 542, decided November 6, 1942, plaintiff was employed by defendant as a pullman porter and was discharged for insubordination and neglect of duty. Plaintiff, through his brotherhood, processed a claim for reinstatement and back wages with company officials, following which plaintiff presented his claim to the National Railroad Adjustment Board. The Board found that the evidence disclosed no grounds for disturbing the action and denied plaintiff's claim. Plaintiff then filed this suit for wrongful discharge, seeking damages and reinstatement. Defendant moved for summary judgment, supporting said motion by affidavit, copy of the employment agreement, and certified copy of the award of the Board. Summary judgment for defendant was granted.

> "There was no denial whatever of the facts stated in this affidavit and no request for a hearing for the purpose of offering parol evidence. The facts alleged in the affidavit therefore stand admitted.
>
> "Defendant's position is that the controversy has been finally settled by the award of the National Railroad Adjustment Board.

"The Award of the Adjustment Board contained no money award. It did determine that plaintiff was discharged because of and as a result of his own misbehavior. That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts. But by the present action plaintiff seeks to have the Court do just that. He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it."

Kelly v. Nashville, Chattanooga & St. Louis Ry., 75 Fed. Supp. 737, decided January 15, 1948, involved the discharge of plaintiff by defendant as a locomotive engineer for alleged misconduct. Company officials affirmed the discharge, and plaintiff then submitted through his brotherhood his grievance to the National Railroad Adjustment Board. Prior to a decision by the Board, plaintiff commenced this action for wrongful discharge. Defendant showed plaintiff's submission to the Board, and then moved for summary judgment. Summary judgment was granted, the Court stating as follows:

"The Railway Labor Act is one of optional remedies. An employee may take advantage of this remedy or may go to court. Should he voluntarily seek relief under the Act, he thereby is obligated to abide by its terms in the same manner as if he had contracted so to do.

"If one who is aggrieved and entitled to the benefits of the Act places his grievance for adjudication by the Adjustment Board upon merit, his voluntary action thereby fixes exclusive jurisdiction. In other words, such person may take the remedies provided by the Act, or he may bring his suit in a court. He cannot do both. The award of the Board and the judgment of a court are equally final."

In *Ramsey v. Chesapeake & O. R. Co.,* 75 Fed. Supp. 740, decided February 18, 1948, plaintiff was discharged by defendant, and thereafter submitted a claim for reinstatement, alleging that his discharge was wrongful, which was processed to final award before the National Railroad Adjustment Board. The Board denied plaintiff's claim, whereupon plaintiff filed this action. Defendant moved for summary judgment, which was granted, even though plaintiff contended there were issues presented in the present case which were not considered by the Board. After citing the Board's findings that it had jurisdiction "over the dispute involved herein," the court stated:

> "Reference to the statements referred to in the submission to the National Railroad Adjustment Board indicates that all of the grievances of the plaintiff were presented to the Board, although the Board in its opinion does not seem to have made specific findings upon all the facts involved.
>
> "It would seem that, having presented his grievances to the Board, the plaintiff was bound by its decision under the language of Sec. 153, subd. 1(m) (of the Railway Labor Act).
>
> "This seems to be in accord with the general law on the subject of res judicata: 'The general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided.' (Citing cases.)"

Hecox v. Pullman Co., 85 Fed. Supp. 34, decided March 19, 1949, was very similar to the *Berryman* case. The plaintiff was discharged as a pullman porter for alleged mistreatment of a passenger. Plaintiff filed a claim for reinstatement with company officials and thereafter processed his claim before the National Railroad Adjustment

Board. The Board concluded that the evidence in the record disclosed no grounds for disturbing the discharge of the plaintiff by the defendant and denied plaintiff's claim. Plaintiff then filed an action for damages for wrongful discharge, or in the alternative for an order reinstating him as an employee. In granting a motion for summary judgment by the defendant, the court cited, with approval, the *Washington Terminal Co., Berryman, Kelly* and *Ramsey* cases.

Reynolds v. Denver & Rio Grande Western R. Co., 174 F. 2d 673, decided by the Tenth Circuit Court of Appeals May 2, 1949 (rehearing denied June 13, 1949), involved an engineer who was accused of failure to respond to a call. After an investigation and hearing plaintiff was dismissed. Plaintiff appealed his dismissal to the superintendent and general manager of the defendant, acting through plaintiff's brotherhood. Plaintiff then made a submission of his claim through his brotherhood to the Railroad Adjustment Board, which denied plaintiff's claim for reinstatement and back pay. Plaintiff then commenced an action for wrongful discharge asking for reinstatement and damages. The District Court granted summary judgment to the defendant, from which plaintiff appealed. The Tenth Circuit Court of Appeals affirmed summary judgment for the defendant.

After citing the provisions of Section 153 First (m) of the Railway Labor Act, the United States Court of Appeals said:

> "It would seem that this language is clear and susceptible only of one construction, namely, that in cases other than where a money award is made the judgment of the Board is final and binding upon the parties thereto. This is the construction which has

been placed upon the provisions of the act by the courts which have considered this question.

"The decision by the Supreme Court in Elgin, J. & E. R. Co. case (footnote 2) turned upon whether a collective bargaining representative without other authority had statutory authority, under the Act, to compromise and settle accrued momentary claims of individual employees. Inherent in the case also was the broader contention that in any event an award by the Board was not a final award and was merely advisory. This contention was disposed of by the Supreme Court in the following language (325 U. S. 711, 65 S. Ct. 1288): 'At the outset we put aside this broadest contention as inconsistent with the act's terms, purposes and legislative history. Upon rehearing, 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928, Justice Rutledge, again speaking for the court, said: 'We adhere to our decision rendered in the opinion filed after the first argument.' * * * All that was decided in the Moore case was that the remedy of the Act was cumulative and not exclusive and that an employee could pursue his legal remedy in court without first exhausting the administrative provisions of the Act. We conclude that the adjudication by the Board in favor of the Railroad Company upholding the dismissal of the appellant is final and binding and may not be challenged by the appellant in this proceeding."

In *Futhey v. Atchison, Topeka & Santa Fe Ry. Co., et al.,* 96 Fed. Supp. 864, decided January 26, 1951, the plaintiff, a locomotive engineer, had been adjudged of unsound mind. Later he was paroled, and subsequently by court order he was restored to the rights and privileges of a sane person. Plaintiff then requested the railroad

to reinstate him to his former employment, but this was refused. Plaintiff, through his brotherhood, made a submission of his claim to the National Railroad Adjustment Board, which made an award denying plaintiff's claim for reinstatement. Plaintiff then filed an action against the railroad and the Board on the ground that the award of the Board was contrary to fact and contrary to law because plaintiff's restoration to sanity was not considered, and praying the court to make an order vacating and setting aside the award and directing the Board to grant plaintiff a rehearing. The court granted motions to dismiss upon the ground that the court lacked jurisdiction to grant the relief prayed for because, under the provisions of Section 153, First (m) of the Railway Labor Act, awards of the Board are final and binding upon both parties, except insofar as they contain a money award.

Parker v. Illinois Central Railway Co., et al., 108 Fed. Supp. 186, decided in 1952, involved a petition to review and set aside an award of the National Railroad Adjustment Board. Plaintiff, a switchman and engine foreman was discharged for violation of operating rules. Plaintiff filed a grievance with his local lodge of the Brotherhood of Railroad Trainmen, requesting that he be reinstated with seniority unimpaired and paid for all time lost. Ultimately, plaintiff's claim was submitted by his brotherhood to the National Railroad Adjustment Board but the Board failed to agree upon an award because of a deadlock. Pursuant to the provisions of the Act, a referee was selected to sit with the Board and to make an award. The award suggested by the referee and adopted by the Board denied plaintiff's claim. Plaintiff then filed a complaint in four counts, one of which attacked the constitutionality of the Board proceedings. The others were based pri-

marily on the ground that the award was contrary to the law and the evidence. A summary judgment was granted to the defendant. The court stated that an award of the National Railroad Adjustment Board does not preclude a judicial review of the validity of the award if a proper issue thereon is presented to the court, such as was done in the case of *Dahlberg v. Pittsburg & L. E. R.*, 138 F. 2d 121, upon a complaint attacking the validity of the award. However, the court further stated:

> "The award carries a presumption of validity and the plaintiff must affirmatively allege such defects as would render it invalid * * * since plaintiff has failed to allege facts, which if proved, would render the award invalid, and since the award itself outlines the findings of fact upon which it is based, the court cannot now review the board proceedings."

It should be noted here that the instant case does not attack the validity of the Board's award; no issues are presented in the pleadings, or otherwise, concerning the regularity of the proceedings before the Board, and there is no question before this court affecting the validity of the Board's award.

Greenwood v. Atchison, Topeka and Santa Fe Ry Co., 129 Fed. Supp. 105, decided February 28, 1955, by the United States District Court for the Southern District of California, involved an injured employee who secured a recovery for his injury under the Federal Employer's Liability Act. Plaintiff was discharged by the defendant and thereafter submitted a claim for reinstatement through his brotherhood to the National Railroad Adjustment Board.

Following an adverse award, plaintiff commenced this action based upon two counts. The first count, based

upon the Federal Employer's Liability Act, was dismissed and is not material here. The second count was a common count for wrongful discharge in violation of the plaintiff's contract of employment. Defendant moved for summary judgment, and submitted in support of said motion the agreement, the record of proceedings before company officials, and the record of proceedings before the Board.

Motion for summary judgment was granted by Honorable Peirson M. Hall, District Judge for the Southern District of California, using these words:

> "The question for decision is whether the plaintiff is precluded from maintaining the second cause of action for wrongful discharge in view of his election to pursue his remedies under the National Railway Labor Act.
>
> "Under Moore v. Illinois Central Railroad Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, the plaintiff need not have followed the administrative procedure set forth in the National Railway Labor Act, but could have filed his suit.
>
> "Having voluntarily decided, however, to pursue his administrative remedy, under the terms of his contract and of the National Railway Labor Act, through to a final decision by the National Railroad Adjustment Board, the plaintiff is now precluded from maintaining his second cause of action.
>
> "The National Railway Labor Act, 45 U. S. C. A. Sec. 153(1)(m), provides: 'A copy of the award shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as

> they shall contain a money award.' Section 153(1)(p) sets forth the procedure for the review of such an award in the appropriate district court. But the within case is not a proceeding under that section. It is an independent cause of action for wrongful discharge."

Majors v. Thompson, 235 F. 2d 449, decided June 30, 1956, by the United States Circuit Court of Appeals for the Fifth Circuit, involved two actions which were consolidated and which had been commenced by two discharged railroad employees against the trustee of N. E., Texas and Mexico Railway Company, seeking back pay and reinstatement or in the alternative, damages for wrongful discharge. Plaintiffs had previously processed their claims to a final determination by the National Railroad Adjustment Board, which had denied said claims. The defendant filed motions to dismiss and for summary judgment in both actions. The District Judge dismissed the actions for failure to state a claim upon which relief could be granted, relying upon a prescriptive provision of the Louisiana Civil Code. An appeal was taken, whereupon the Court of Appeals reversed the judgment upon the ground stated by the district judge and directed that each of the complaints be dismissed for lack of jurisdiction. In its opinion the Fifth Circuit Court of Appeals stated:

> "Where the employee has voluntarily applied to the board for reinstatement, an election of remedies has been made which bars the right to litigate before the courts a claim of damages for wrongful discharge (citing cases)."

Many cases have dealt with the question of court review of an award by the Board. The case of *Ellerd v. So. Pac. Railroad Co.* (7th C. C. A.), 241 F. 2d 541, decided March 1, 1957, is one of the most recent cases involving court review, and is cited because Appellant's Argument No. II, pages 17-26 of his brief, in effect, asks this court to review the evidence before the National Railroad Adjustment Board and reach a conclusion contrary to that of the Board. Ellerd was employed by defendant in the State of Arizona. He was discharged for physical disability. His Union presented a claim for reinstatement in his behalf which was denied by the Board. Plaintiff then commenced an action in the State of Arizona against the defendant carrier and the Board, in which he sought a review of his claim and requested the court to set aside the award of the Board. Plaintiff expressly claimed in his complaint that his Union was not authorized to represent him, that he had no knowledge of the proceedings before the Board, and that he had been deprived of valuable rights without due process of law. The District Court in Arizona dismissed the Board for lack of jurisdiction because it was not subject to process in Arizona, and granted summary judgment to the defendant carrier based upon the denial of plaintiff's claim by the Board. Plaintiff then commenced this action in the District Court of Illinois seeking to set aside the award of the Board, expressly alleging in his complaint lack of authorization of his union and lack of due process of law. Summary judgment was granted by the District Court in

Illinois upon the ground that the decision of the District Court in the State of Arizona was *res judicata*. Plaintiff then took an appeal to the Seventh Circuit Court of Appeals, which reversed the judgment and remanded the case for a determination of plaintiff's allegation that his brotherhood was not authorized to represent him before the Board. In its opinion, the Seventh Circuit Court of Appeals stated its construction of the statute, and various decisions, as follows:

> "The statute itself, 45 U. S. C. A., Sec. 153(m) is, inter alia, as follows: '* * * the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' Under this act, in Reynolds v. Denver & Rio Grande Western R. Co., 10 Cir., 174 F. 2d 673, the court held that the Act, where the order is not for a money award, clearly precludes judicial review. See also Railroad Yardmasters of North American v. Pittsburg & L. E. R. Co., D. C. 39 F. Supp. 876. The Fifth Circuit, in Estes v. Union Terminal Co., 89 F. 2d 768, decided that a court cannot set aside an order of the board, if all substantial rights have been fully protected. In Sigfred v. Pan American World Airways, 5 Cir., 230 F. 2d 13, the court declined to review rulings of the board in the absence of any question regarding jurisdiction of the board or regularity of its proceedings. See also Switchman's Union of North America v. National Mediation Board, 320 U. S. 297, 64 S. Ct. 95, 88 L. Ed. 61; Sadler v. Union Railroad Co., D. C., 125 F. Supp. 912. In Pigott v. Detroit, Toleda & Irontown R. Co., 221 F. 2d 736, the Sixth Circuit held that the District Court was without jurisdiction to review a similar order, in view of the fact that there was no show-

ing that the plaintiffs had been denied due process of law. In Hargis v. Wabash Railroad Co., 7 Cir., 163 F. 2d 608, we had before us the question of whether the court could review an order of the National Railroad Adjustment Board. A majority was of the opinion that the court was, in the absence of constitutional defects, without jurisdiction to do so, relying upon Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886.

"The sound conclusion to be drawn from the statute and the various decisions, seems to be that, in the absence of any question as to the regularity of proceedings before the board, for lack of notice or other defect preventing due process of law, the district court has no right to review an order of the board. If that body has jurisdiction and proceeds according to constitutional guarantees, its decision is, in the words of the statute, final."

Again, it should be noted that Appellant's complaint is a simple action for wrongful discharge; that Appellant makes no claim that his Union was not authorized to represent him, or that the award of the Board is invalid, or that the award of the Board should be reviewed and set aside.

II.

An Award of the National Railroad Adjustment Board Is Not Only Final and Binding on the Parties, but Will Not Be Reviewed by the Courts in the Absence of Any Question as to the Regularity of Proceedings Before the Board Which Prevent Due Process of Law.

The Specification of Errors of the Appellant [R. 3] is extremely broad and does not specify wherein the District Court erred in granting summary judgment to the Appellee. Appellant's Brief, in support of this broad specification of errors, presents two arguments: (1) that decisions of the Board are not final and binding, and (2) that the award of the Board in the instant case was not on the merits. Appellant's first argument has already been answered by the cases heretofore cited in this brief. As to Appellant's second argument, Appellee earnestly insists that this court lacks jurisdiction to review the award of the Board because the record does not contain a single allegation attacking the validity of the award. No claim is made in the pleadings, or otherwise in the record or in Appellant's argument, that there were any defects of any kind whatsoever in the proceedings before the Board, or that there was any irregularity in such proceedings which would deprive Appellant of a fair hearing, or due process of law. (*Parker v. I. C. Ry. Co.,* 108 Fed. Supp. 186; *Berryman v. Pullman Co.,* 48 Fed. Supp. 542; *Kelly v. N. C. & St. L. Ry. Co.,* 75 Fed. Supp. 737; *Ramsey v. C. & O. R. Co.,* 75 Fed. Supp. 740; *Reynolds v. D. & R. G. W. R. Co.,* 174 F. 2d 673; *Michel v. L. & N. R. Co.,* 188 F. 2d 224, cert. den. 342 U. S. 862, 96 L. Ed. 648; *Ellerd v. Southern Pacific Railroad Co.,* 241 F. 2d 541.)

However, assuming for the sake of argument only, that the matter contained in pages 17-26 of Appellant's Brief is properly before this court for consideration, it is apparrent from the record that Appellant has had a determination, on the merits, of the very question which Appellant says is "the heart of the matter" namely, did the Appellant do wrong in returning to Las Vegas? Appellant attempts to find fault with the language of the Board's award because it does not contain a specific finding as to each fact presented in the various submissions to the Board. It is noteworthy that in his Order granting summary judgment, Honorable John R. Ross, United States District Judge, found "from the pleadings, admissions, and affidavits on file that there is no genuine issue of any material fact and that the defendant is entitled to a judgment as a matter of law, and that such showing has not been successfully controverted by the plaintiff." Appellant did not request the District Court to make specific findings as to each fact presented to the court, nor does Appellant now complain that specific findings as to each fact were not made by the District Court. Such findings are no more necessary in awards of the Board than they are in orders of the court. Obviously, the findings of the District Court are sufficient to support summary judgment or Appellant would have included any defect therein in his specification of errors. It is equally obvious that the findings of the National Railroad Adjustment Board in its award [R. 56-59] are sufficient to support a denial of Appellant's claim, on the merits, and the Board was not required to submit specific findings on each fact presented in the submissions before it. (*Ramsey v. Chesapeake & O. R. Co.*, 75 Fed. Supp. 740.)

Appellant was specifically charged with violating two operating rules of the Appellee when he returned from Nipton, California, to Las Vegas, Nevada. At page 21 of Appellant's Brief, Appellant asserts that the heart of the matter to be investigated was whether or not Appellant did wrong in so returning. The Board in its award stated that "claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline" [R. 57]. The Board, therefore, made a specific finding on the "heart of the matter," as phrased by Appellant. After discussing Appellant's conduct in the investigation hearing, the Board in its award further stated:

> "It must be understood that there is no greater sanctity in the investigation rule than any other on the property. All rules are for the aid, guidance, and protection of responsible persons. The right of the employee to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith." [R. 58.]

Appellant argues that the Board did not consider any provisions of the agreement nor even refer to them by indirection and that the merits of the controversy were not considered (Appellant's Br. p. 22). Yet, Appellant concedes at page 21 of his brief that the heart of the matter to be investigated was whether or not Appellant did wrong in returning from Nipton to Las Vegas; that a determination of this question would undoubtedly be a determination on the merits; and that this question was

presented by the submissions of the parties. Appellee contends that this question was not only considered by the Board but was decided adversely to the Appellant when the Board found that his violation of operating rules by returning to Las Vegas was insubordination and merited discipline. Appellant never doubted the effect of the Board's award. By letter dated July 1, 1952, by the then General Chairman of his brotherhood, he was forwarded a copy of the award, with this comment: "It is with the deepest regret that I note this award denies your case in its entirety" [R. 83]. Furthermore, Appellant acknowledged, in his letter dated December 5, 1952, to Mr. E. J. Connors [R. 63], that he knew his claim had been heard and denied by the Board. If Appellant had any doubt as to the effect of the denial, or whether the "merits of the controversy" had been considered, Appellant could have obtained an interpretation under the "finality" provision of the Act, Section 153 First (m), the last sentence of which reads as follows: "In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." However, Appellant did not seek an interpretation of the award. The only other question presented by Appellant in his submissions to the Board concerned compliance with the investigation rule provided in Article 33 of the agreement. This question was specifically decided by the Board, adversely to the Appellant [R. 58-59].

Thus, even if it be assumed that the fugitive issue found only in the second argument of Appellant's Brief is properly before this court for consideration, it is obvious that the Board determined such issue in its award; that such determination was on the merits, after a consideration

of voluminous material; and that the award of the Board denying Appellant's claim is final and binding upon the Appellant.

Conclusion.

This court, as well as other appellate tribunals, has often held that it must view the evidence most favorably to Appellees and draw all inferences fairly deducible from the facts in their favor. (*United States v. Aspinwall,* 96 F. 2d 867.)

Since awards of the National Railroad Adjustment Board are final and binding upon both parties, and since this court lacks jurisdiction to review the Board's award, Appellee respectfully submits that the order of the District Court granting summary judgment for the defendant should be affirmed.

Respectfully submitted,

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